In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1436

MARVIN D. BLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is not reported. The opinion of the court of appeals (Pet. App. 1a-15a) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1972. The petition for a writ of certiorari was filed on May 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly admitted into evidence statements made by and records belonging to petitioner over petitioner's objection that the evidence was obtained by fraud and deceit practiced by agents of the Internal Revenue Service.

STATEMENT

Petitioner was convicted after a jury trial of willfully attempting to evade his personal income taxes for 1962, 1963 and 1964, in violation of Section 7201 of the Internal Revenue Code of 1954 (R. 1–2, 206).[1] Petitioner, a manufacturer's representative, failed to report as income reimbursements for telephone expenses initially paid by petitioner in 1962 ($21,910.09; R. 443), in 1963 ($28,069.53; R. 444), and in 1964 ($30,052.28; R. 444).

During a routine audit (R. 90), a revenue agent of the Internal Revenue Service met with the accountant who prepared petitioner's tax returns and the agent was given (R. 93–96, 256–284), with petitioner's consent (R. 609), certain of petitioner's records and a summary schedule prepared by the accountant of telephone expense reimbursement checks (R. 311–316, 329, 335, 607A, 609). A special agent of the Intelligence Division was thereafter assigned to investigate the case for possible fraud and criminal violations (R. 97, 108–109.) The accountant refused to furnish the records to the special agent without permission from petitioner (R. 112). The special agent was subsequently introduced to petitioner by the revenue agent only as an employee of the Internal Revenue Service (R. 112, 347); petitioner testified it would have meant nothing to him had the special agent been fully identified (R. 48–49). After this meeting, petitioner instructed the accountant to give the records to the special agent (R. 112–114). The records which

[1] "R." references are to the appendix filed in the court below.

were furnished to the special agent on this occasion were the same records previously examined by the revenue agent (R. 284, 341–342).

On November 9, 1965, petitioner, accompanied by his accountant, met with the agents at the office of the Intelligence Division and was advised by the special agent of his title and his function to investigate suspected internal revenue violations (R. 13, 115). Petitioner, on this occasion, acknowledged that he understood the agent's warning that he was not required to furnish records or information which was incriminating (R. 115). Petitioner's accountant, being aware that the investigation was being conducted by the Intelligence Division (R. 613), objected to the absence of an attorney and to the scope of the agent's questions (R. 69–70, 117, 614). Petitioner directed the agents to "go ahead" (R. 635), made no objection to questions and admitted that he had received and failed to report the telephone expense reimbursements (R. 342–343, 636).

Petitioner had two later meetings with the agents. On November 15, 1965, he had a casual encounter and cup of coffee with the revenue agent (R. 327). He asked the agent what to do about his accountant's advice to get an attorney, and was told by the agent that he could not advise him but that the Internal Revenue Service would "not be so crude as not to inform him in ample time that he should obtain an attorney" (R. 327–328, 332). On February 10, 1966, petitioner met again with the special agent, who disclosed his function to determine if the

understatement of taxes was intentional, and warned petitioner of his rights to an attorney and not to incriminate himself (R. 119–120). The special agent told petitioner that records of petitioner which had previously been obtained from third parties were not subject to petitioner's self-incrimination privilege (R. 123).

Prior to trial, petitioner moved to suppress from evidence his records and statements obtained by the special agent on the ground that he had not been properly advised by the Internal Revenue Service of the criminal nature of the investigation and of his constitutional rights (R. 14, 26). After an evidentiary hearing (R. 43–125) and oral argument (R. 130–146), the district court initially granted the motion to suppress (R. 146). But upon reconsideration at the government's request, an order was entered denying the motion to suppress (R. 148–150). Petitioner renewed his motion to suppress at trial, but was again unsuccessful (R. 304).

The district court denied (R. 190) petitioner's request (No. 40; R. 181) that the jury be instructed that any statements made by the defendant were not admissible and should be disregarded unless the evidence showed beyond a reasonable doubt that the statement was voluntary and made after petitioner was advised of his right to counsel and to remain silent.

The court of appeals affirmed petitioner's conviction, upholding the denial of the motion to suppress on the grounds that petitioner effectively consented to the transfer of the records on November 9, 1965, and, in subsequent interviews, was either aware of his

rights or had furnished no evidence (Pet. App. 11a, 13a–15a).

ARGUMENT

Petitioner does not assert here that the agents in investigating him failed to comply with applicable Internal Revenue Service directives or that he should have been given the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436[2] (see Pet. 7), but contends solely that he was prejudiced by the district court's failure to apply a two-step procedure in determining the voluntary nature of his admissions. In our view, this contention is without merit. Moreover, the underlying substantive issue is of limited importance, since, as petitioner recognizes (Pet. 7), the Internal Revenue Service has since October 1967 required special agents to identify themselves upon initial contact with a taxpayer and state that they are investigating the possibility of criminal tax fraud (Pet. App. 19a). Review by this Court thus seems unwarranted.

1. Petitioner's contention (Pet. 10) that the record does not disclose whether the district court found that petitioner's admissions were obtained voluntarily is unfounded. The requirement of a preliminary deter-

[2] The Fifth Circuit has repeatedly adhered to the rule that, in cases of non-custodial interrogation in Internal Revenue Service investigations, *Miranda* warnings are not required. *United States* v. *Prudden*, 424 F. 2d 1021, certiorari denied, 400 U.S. 831; *United States* v. *Ponder*, 444 F. 2d 816, 819, certiorari denied, 405 U.S. 918. This is the rule generally followed in the circuits. *United States* v. *Jaskiewicz*, 433 F. 2d 415, 420 (C.A. 3) (citing cases), certiorari denied, 400 U.S. 1021. Only the Seventh Circuit has ruled otherwise. *United States* v. *Dickerson*, 413 F. 2d 1111, 1116–1117 (C.A. 7).

mination by the trial court on the voluntary nature of a defendant's admissions does not mandate express findings in each case by the trial judge, but is satisfied where the issue is clearly raised, heard and decided and where "the judge's conclusions are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary." *Jackson* v. *Denno*, 378 U.S. 368, 378–379; *Sims* v. *Georgia*, 385 U.S. 538, 544; *Lego* v. *Twomey*, 404 U.S. 477, 484; *United States* v. *Smith*, 418 F. 2d 1294, 1295 (C.A. 5); *Sheer* v. *United States*, 414 F. 2d 122, 125 (C.A. 5), certiorari denied, 396 U.S. 946; *United States* v. *Chapman*, 448 F. 2d 1381, 1386–1387 (C.A. 3); *Helmick* v. *Cupp*, 437 F. 2d 321, 323 (C.A. 9). Petitioner has not suggested that a different rule should apply with respect to the statutory requirement of 18 U.S.C. 3501(a) that the trial judge shall initially determine any issue as to the voluntariness of a confession.

In this case, the record shows with "unmistakable clarity" (*Sims* v. *Georgia*, *supra*, 385 U.S. at 544) that the issue whether petitioner's admissions were voluntary was fully litigated and resolved against petitioner. The district court vacated its first order and denied the motion to suppress after the government, by its motion for rehearing, brought to the court's attention an intervening decision of the Fifth Circuit, *United States* v. *Tonahill*, 430 F. 2d 1042, certiorari denied, 400 U.S. 943. In *Tonahill*, on appeal by the United States from an order suppressing admissions made by a taxpayer to revenue and special agents, the court held that no deceit was practiced

simply because the agents only informed the taxpayer that they were investigating "large discrepancies" and made no reference to the possible criminal aspects of the investigation. As petitioner's argument in this case is that the agents' failure to refer to the possible criminal aspects of their investigation constituted deceit, the relevance of *Tonahill* and the nature of the district court's ruling here are unmistakably clear.

2. Petitioner also argues that under 18 U.S.C. 3501, the issue of voluntariness should have been submitted to the jury. Section 3501 requires in pertinent part:

> (a) In any criminal prosecution brought by the United States * * *, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
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> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

While the statute appears to direct that the jury consider evidence of voluntariness in deciding what weight to give a confession, the responsibility under the statute for deciding whether a confession is or is not voluntary and whether or not it is admissible in

the court's. Petitioner, without referring to the statute, requested the court to instruct the jury to decide the basic question of admissibility (R. 181-182), and this the court properly declined to do. Cf. *Lego* v. *Twomey*, 404 U.S. 477, 489-490.

Although the court on its own might have given an instruction along the lines of 18 U.S.C. 3501, the failure to do so was not plain error. Since petitioner's claim that his admissions were involuntarily related only to the alleged deceit of the government agents, not to the possibility that his statements were made under coercive pressure, the determination of voluntariness turned solely on a legal assessment of the agents' conduct. There was no indication that the statements were inaccurate or should not be given full weight, and thus an instruction to the jury to consider their weight in light of the evidence concerning voluntariness would have been superfluous.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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